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90-826

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LIONEL MARQUEZ,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November, 1990

QUESTION PRESENTED

Petitioner pled guilty to six counts of a Federal indictment following a brief meeting with counsel in regard to the plea. However, prior to sentencing, Petitioner moved to withdraw the plea, asserting that the hurried plea was a result of the ineffective assistance of counsel and the coercive pressure placed upon him by his wife, the Government and his own attorney.

The questions presented are:

(A) Does Petitioner's counsel's overriding concern for the collection of his fee from seized assets of the Petitioner now in possession of the Government, at the expense of trial preparation, deprive the accused of his right to the undivided loyalty of his attorney so as to constitute ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution?

(B) Does coercive pressure exerted on the Petitioner by his co-defendant wife, the Government and the Petitioner's own attorney to accept a package deal plea of guilt violate the Constitutional mandates of a free and voluntary plea and thereby make such plea void?

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IN THE
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LIONEL MARQUEZ,
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vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 26, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished; however it is reproduced as Appendix "A" and attached hereto.

JURISDICTION

The jurisdiction of this Court is respectfully invoked pursuant to the authority of 28 U.S.C. §1254 (1). The opinion of the United States Court of Appeals for the Second Circuit was filed on July 26, 1990 and the timely filed Application for Extension Of Time For Writ Of Certiorari , Application No. A-279, was granted on October 15, 1990 by Mr. Justice Marshall. Such extended the time in which to file this Petition for Certiorari to and including November 23, 1990. This Petition for Certiorari was filed by that date.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment To The Constitution Of The United States provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

Rule 32 (d) of the Rules of Criminal Procedure states as follows:

> "**Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before the sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. Any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255."

STATEMENT OF THE CASE

Lionel Marquez petitions this court to grant a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

This Petition raises two substantial issues. The first question is whether Petitioner's counsel's overriding concern for the collection of his fee from seized assets of the Petitioner, now in possession the Government, at the expense of trial preparation, deprived Mr. Marquez of his right to the undivided loyalty of his attorney so as to constitute ineffective assistance of counsel. Petitioner submits that, on the facts of this case, counsel for Petitioner found himself torn between his client's best interests and the interests of his own financial well being, ultimately succumbing to his underlying desire for financial success while sacrificing the best interests of Petitioner. In doing so, Petitioner asserts counsel deprived his client the undivided loyalty to which Petitioner was entitled, thereby denying Petitioner effective assistance of counsel.

The second question is whether coercive pressure exerted on Mr. Marquez by his co-defendant wife, the Government and Petitioner's own attorney to accept a package deal plea of guilt results in an involuntary plea, thereby making such coerced plea invalid and void. Petitioner submits that on the facts of this case, there was sufficient evidence to establish coercion of the guilty plea to which Petitioner would not have agreed to but for the undue and overbearing pressure placed upon him. Thus, Petitioner asserts, such plea of guilty should be withdrawn, as it is invalid and a violation of Petitioner's constitutional and statutory rights.

The Petitioner, Lionel Marquez, was indicted on De-

cember 22, 1987. On June 30, 1989, he was subsequently convicted by a package deal plea of guilty to six counts of that indictment, to-wit: violating the Racketeering Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1962 (C) (d); conspiracy to distribute heroine, 21 U.S.C. §846; distribution of heroine, 21 U.S.C. §841 (b) (1) (A), 21 U.S.C. §812 (b) (1) (A); heading a Continuing Criminal Enterprise (CCE), 21 U.S.C. §848 (a); and tax evasion, 26 U.S.C. §7201.

On November 3, 1989, the Petitioner was sentenced to twenty years imprisonment concurrently on all but the tax evasion count, to which he received three years consecutive. He was fined $200,000.00, assessed $300.00, sentenced to five years supervised release and forfeited all his seized assets. Petitioner has been incarcerated since his arrest on the indictment in 1987.

Prior to June 30, 1989, much of the litigation in the instant case revolved around Petitioner's prior counsel, Richard Rehbock's (Rehbock), attempt to extract his attorney's fee from money seized from the Petitioner at the time of his arrest. Much of the history of that struggle is chronicled in an earlier decision of the Second Circuit, *United States v. $876,915.00 United States Currency, More or Less*, 874 F.2d 104 (2nd Cir. 1989) and occurred during that "window" between the Second Circuit's *en banc* ruling in *United States v. Monsanto*, 852 F.2d 1400 (2nd Cir. 1988), and this Court's decision in *United States v. Monsanto*, _____ U.S. _____, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989).

Rehbock entered the case in September of 1988. Between September of 1988 and January of 1989, Rehbock received discovery in this case but it was never discussed with Petitioner. The limited work on Petitioner's cause

soon ceased, pending Rehbock's receipt of his fees from the Government.

A. Rehbock:

> In January of 1989 . . . [when] it was clear that the Government was not going to pay me or resisted every effort to pay me money out of forfeited moneys, I announced to [Petitioner] and to the Court and to [Assistant United States Attorney Anne Vitale] that I was doing no further substantive work on the case. I would continue to represent [Petitioner] in the Monsanto motion and would not resume working on the case until such time as I actually received payment and filed a notice.

(Hearing of October 13, 1989, pgs. 30-31).

Following payment of an original retainer of $100,000.00 from the seized moneys, Rehbock once again began working on Petitioner's indictment. By his own account, Rehbock began working on this "massive case," but "not any intensified manner, little things here and there". (Hearing of October 13, 1989).

On May 12, 1989, the prosecutor offered to pay Rehbock the second trial court-ordered amount of approximately $100,000.00 upon agreement to a firm trial date no later than June 12, 1989. Otherwise, prosecution asserted that the Government would seek a stay on this second payment. The Government's position was that a check would be turned over to Rehbock only upon such agreement. (Hearing of May 12, 1989, p.3). This led Rehbock to accuse the Government of "extortion".

A. Rehbock:

> I told [A.U.S.A. Vitale] in exact words when she

> told me the Government made me an offer. . . to try the case on June 12, or else they will seek a stay in the U.S. Supreme Court I told her, quote unquote, that's extortion; and I believe that's exactly what it is. . . I'm sitting in a position now where I have essentially four weeks to try a massive case.
>
> * * *
>
> And I think the Government . . . is saying to me, capitulate to what I want or else I am going to keep delaying your getting paid on this case.

Id.

Rehbock further responded to the Government's position:

> Getting around to the horn, what's really most oppressive about this offer from the Government . . . it is even more oppressive because in good conscience I feel that's not an appropriate time for me to do it; 30 days from today. And I think what's really put to task is the Government is putting me once again in the position of conflict of interest. I sacrifice my client's rights in exchange for mine. (Emphasis added).

(Hearing of May 12, 1989, p.8).

> I do feel that there is, however, an expressed desire upon the government to act in the dual role of being a staunch adversary to the [Petitioner] and presumably his counsel and, at the same time be the exchequer of the funds to be doled out to counsel. This conflict is most serious and should be avoided.

(Letter of Rehbock, dated September 22, 1988, p.3)

On May 12, Rehbock noted that nothing had been done

on the case since January and there was considerable work to be done. Counsel further informed the Court that, "[e]ven given I work the next four to six weeks, it's virtually going to be full time." (Hearing of May 12, 1989, p.7). Further, Rehbock addressed the Court, stating that the "vast majority of this time [spent putting in the $200,000.00 worth of work on the case claimed by counsel] has been taken up with the litigation on Monsanto [claims for attorney fees] and not on the merits of this case".
Id. at p.9.

After a date of June 5, 1989 was set for jury selection, June 19, 1989 was the date set for trial. The Petitioner then personally appealed to the court: "30 days is not going to get him [Rehbock] prepared to trial. If he is going to give me a shoddy defense, I don't want him as a lawyer." Id. at p.12.

During this period, Rehbock "prepared certain aspects of th[is] case very carefully, while not preparing other aspects quite as carefully". (Hearing of October 13, 1989, p.62). Rehbock, for instance, did not "key in on" the tax count to which he ultimately persuaded Petitioner to plead guilty. Id. at p.63. By his own account, Rehbock did "a little triage" in case preparation. Id. Although never submitting one motion on Petitioner's behalf as concerning the indictment, Rehbock did spend untold hours, including taking an appeal to the Court of Appeals, trying to get his fee.

It was the Government's position that the plea was a one-day-only offer, to be taken on June 30, 1989. The Court's schedule and the Government's "now or never" position gave Petitioner little time to discuss and consider his plea.

Ms. Vitale: I will not take a plea if it runs after 5:00 p.m. today.

The Court: I so gather it's now or never.

Id. at p.18.

Mr. Rehbock: Could we have 15 minutes to confer on the guts of the allocation?

Id. at p.20.

The Court: I am due in northwest Connecticut at 7:00 o'clock tonight for a function I cannot be late for, and I am leaving here at 5:00 o'clock. So were running short of time.

Id. at pgs. 20-21.

The entire twenty minutes Petitioner had to confer with counsel was spent insuring that his allocation satisfied the court. The result was that Petitioner plead guilty to some crimes which he did not commit. Further, at no time during the course of these proceedings did counsel make any sort of motion for a postponement in which he could properly advise his client and provide Petitioner with the appropriate information in which to make an informed and intelligent pleading to the court.

Once paid, Rehbock would visit Petitioner, but never speak of the facts of the case, instead choosing to insist upon the Petitioner to plead guilt. As Petitioner refused to discuss the issue, Rehbock then turned his attention to Petitioner's wife. It was Petitioner's contention that it was Rehbock's focusing on Mrs. Marquez and his attempt to get her to convince her husband to plead that pushed

Petitioner's wife to the point of illness and hysteria. Rehbock would so intimidate Mrs. Marquez by professing that if she did not ask her husband to plead, they would have to go to trial and she would spend the rest of her life in prison.

Petitioner insisted that this unfair treatment of his wife forced him into a situation in which he had no choice other than to plead. He asserted that this kind of extreme pressure which a husband is under when his wife is also indicted amounts to duress and coercion when the wife is so inflicted with anguish; her husband has no real alternative other than to plead, despite his innocence of the charges against him. Rehbock characterized the act of Petitioner in this situation as "chivalry and respect for the person you are married to". (Hearing of October 13, 1989, p.50).

Reluctantly, Petitioner agreed to the package deal plea agreement, knowing only of the possible sentence and not to what he was actually pleading.

Rehbock received his first payment from Petitioner's seized funds in the amount of $100,000.00 from the Government concerning Petitioner's cause on June 6, 1989. Additionally, he had obtained a copy of the Court's Order for another $100,000.00 payment on June 27, 1989, just three days prior to the coerced guilty plea. The second payment of $94,000.00+ was delivered to Rehbock on October 12, 1989. Such payment occurred one day prior to Petitioner's initial hearing on his motion to withdraw his plea of guilty.

Following Petitioner's plea of guilt, Rehbock returned numerous boxes of papers unopened to Petitioner; such boxes contained papers necessary for Petitioner's defense.

Had these boxes have been opened, Petitioner contended, the papers contained within would have proven Petitioner's innocence as to the tax counts to which he had hurriedly and unadvisedly pled.

On September 5, 1989, Petitioner filed a pro se motion to withdraw his plea. Additionally, on October 10, 1989, Petitioner, through new counsel, filed a formal motion to withdraw Petitioner's plea. These motions were denied and Petitioner was subsequently sentenced on November 13, 1989. Petitioner then filed a timely appeal of this matter with the United States Court of Appeals For The Second Circuit. The court denied Petitioner's appeal. The opinion issued by the Second Circuit on July 26, 1990 is attached hereto as Appendix "A".

REASONS FOR GRANTING THE WRIT

It has long been held that a presentence motion to withdraw a plea of guilty should be granted if "for any reason . . . (it would) seem fair and just." *Kercheval v. United States*, 274 U.S. 220, 224 (1927); F.R.Cr.P. 32 (d). Further, to be admissible, a confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by and direct or implied promises, however slight, nor by the exercise of any improper influence. *Brady v. United States*, 397 U.S. 742 (1970). Therefore, the ends of justice indicate that, should any "fair and just" reason exist, a defendant should be allowed to withdraw his presentence plea, as substantial justice would be promoted in doing so.

The rationale of these and other Supreme Court decisions, as well as the language contained within the Federal Rules, indicate that the voluntariness of a defendant's guilty plea and the ineffectiveness of counsel are certainly

both grounds upon which to withdraw a presentence plea of guilt. Additionally, however, the language suggests that a defendant does not have to make a detailed showing, only that any "fair and just" reason exists to withdraw the plea where such reason makes a definite effect upon the voluntariness of the plea. The Second Circuit ruling is not in accord with this rationale.

This case presents an opportunity for this Court to determine the statutory and constitutional implications of the presentence request for the withdrawal of pleas of guilt in relationship to the showing necessary to establish the standard of "any fair and just reason" to withdraw such pleas.

THERE IS CONSTITUTIONAL DISAGREEMENT BETWEEN THE SECOND CIRCUIT AND THE LANGUAGE AND PRINCIPLES CONTAINED WITHIN BOTH THE DECISIONS OF THIS SUPREME COURT AND CIRCUIT COURTS, AS WELL AS THE FEDERAL RULES OF CRIMINAL PROCEDURE, IN REGARD TO THE REQUIREMENTS NECESSARY TO PERMIT DEFENDANT TO WITHDRAW HIS PRESENTENCE REQUEST FOR WITHDRAWAL OF HIS PLEA OF GUILT.

a. The Conflict Of Interest Existing Between Petitioner And Petitioner's Counsel Was Sufficient To Fall Within The Established Standard.

The line of decisions stretching from *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932) to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) makes indisputably clear that felony criminal defendants are constitutionally entitled to the undivided loyalty of competent counsel. See *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461

(1938); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Counsel whose interests diverge from that of the defendant - client cannot render competent legal services or give the client undivided loyalty. This Court has held therefore that, where such an actual conflict of interest exists, prejudice is presumed. See *Strickland*, 466 U.S. at 692; *Cuyler*, 446 U.S. at 350. Once a defendant "has prove[n] the existence of an actual conflict, only an adverse impact on the attorney's performance must be shown." *Ruffin v. Kemp*, 767 F.2d 748, 752 (11th Cir. 1985); see also *United States v. Lorizzo*, 786 F.2d 52, 58 (2nd Cir. 1986).

An actual conflict of interest occurs in circumstances where a lawyer's interests are such that it is reasonable to believe that the attorney would be tempted to act in a manner inimical to the client's best interests. *Reckmeyer v. United States*, 709 F. Supp. 680, 688, aff'd. 900 F.2d 257 (2nd Cir. 1990). "Actual conflict" exists when a defense attorney places himself in a situation "inherently conducive to divided loyalty." *Zuck v. Alabama*, 558 F.2d 436, 439 (5th Cir.), reh'g denied; *Zuck v. Alabama*, 591 F.2d 102, cert denied, 444 U.S. 833 (1979); (citing *Calstillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974).

The motives of defense counsel are irrelevant, as is the argument that the attorney did not allow his conflicted loyalties to effect his representation. *Zuck*, 588 F.2d at 439. The fact that a particular lawyer may actually resist the temptation to dampen the ardor of his client's defense is of no moment, as the Sixth Amendment requires that a defendant not be represented by counsel who might be so tempted. *Zuck*, at 440. Obviously, the hardest conflicts of loyalty arises between the personal interests of a lawyer and that of his client. *Hafter v. Farkus*, 498 F.2d 587, 589

(2nd Cir. 1974).

Possible conflict arises where a lawyer may advise a client to accept an agreement in an effort to preserve his fee, thus constituting ineffective assistance of counsel as outlined in *Strickland*. See *Caplin and Drysdale v. United States*, 491 U.S _____.; 109 S.Ct. _____; 105 L.Ed.2d 528, 546 (1989).

In addition, a guilty plea may be rendered involuntary due to counsel's failure to familiarize himself with the facts and the law relevant to the accused's case. *Scott v. Wainwright*, 698 F.2d 427 (11th Cir. 1983). In regard to the determination of voluntariness, an attorney's representation that he had explained the charges to the accused is insufficient. *McCarthy v. United States*, 89 S.Ct. 1166, 394 U.S. 459, 22 L.Ed.2d 418 (1969). Such is why is it incumbent upon the presiding judge to make the investment of time and effort necessary for the determination of voluntariness. *United States v. Kamer*, 781 F.2d 1380, cert denied 479 U.S. 819, 107 S.Ct. 80, 93 L.Ed.2d 35 (1986). The fact that counsel gave inadequate representation requires that a defendant be permitted to withdraw his plea where the plea was essentially the result of the attorney ineffectiveness. *United States v. Giardino*, 797 F.2d 30 (1st Cir. 1986).

Conflict plainly arises where a lawyer becomes so entangled in the battle for fees that the actual merit and cause of the client appears to become of secondary importance to the attorney. In those circumstances, it is reasonable to believe that the lawyer would be tempted to sacrifice the client's best interests for the sake of his own financial well being. See *Reckmeyer v. United States*, 709 F.Supp. 680, aff'd. 900 F.2d 257 (2nd Cir. 1990). Further, a defendant receives ineffective assistance of counsel

where counsel repeatedly acts at cross-purposes with defendant. See *People v. Brundadge*, 83 App.Div.2d 579, 441 NYS2d 120 (2nd Dept. 1981).

Despite counsel for Petitioner's professed loyalty to his client the record indicates that Rehbock's overriding concern was in obtaining a fee. In fact, this type of conflict of interest was a far more dangerous one than the typical potential conflict. Counsel did not find himself torn between loyalties to co-defendants. Neither was counsel placed between present and former clients. Instead, Rehbock found himself in the near-impossible situation of having to make key decisions regarding Petitioner's pending criminal case, torn between concern for his client and concern for his own financial betterment.

Additionally, the prosecution's complicity in exasperating this conflict is in direct violation ruling of this Supreme Court:

> Government violates the right to effective assistance [of counsel] when it interferes with the ability to make independent judgments about how to conduct the defense.

Strickland , 466 U.S. at 686.

By essentially creating a system akin to contingency fees for defense lawyers, the Government acts to violate a client's Sixth Amendment right to counsel when it dangles counsel's fees before them. Only attorneys who have played the game and who have fully cooperated with the prosecution, i.e., the adversarial party, would be able to collect their fees. Surely, this can no doubt amount to extortion by the Government. Further, contingent fees in criminal cases are generally considered unethical. See ABA Model Rules of Professional Conduct, Rule 1.5 (d)

(2) (1983); ABA Model Code of Professional Responsibility DR 2 - 106 (C). Thus, where a lawyer's firm prospect of collecting a fee turns on the cooperative nature of the attorney, such violates the effective assistance of counsel to which the defendant is guaranteed.

In the Second Circuit's determination that the evidence was sufficient to uphold Lionel Marquez' plea of guilty, the court below did note that:

> [T]he Government came perilously close to creating a conflict of interest situation by attempting to extract a concession from Rehbock concerning a trial date as a condition of its compliance with the order to turn over the funds. (Emphasis added).

(Appendix A, page 6).

Although the lower court stated that the trial judge avoided such conflict by ordering the Government to make payment to Rehbock without concession of counsel, the Second Circuit failed to note the conflict which existed between the attorney and his client, as clearly evidenced in the facts contained within the record.

Despite the fact that the trial was postponed and payment to counsel was ordered, Rehbock still remained unprepared, his time was invested instead in the retainment of monies and the infliction of anguish on Petitioner and others in hopes of inducing Petitioner to plead guilt, thus negating the need for preparation. The record reflects this lack of preparation and greed on the part of counsel. Had Mr. Marquez had effective counsel, the record also reflects that no plea of guilty would have been entered; soon after his plea of guilt, Petitioner asserted his innocence stating that, but for the ineffectiveness of counsel and the extreme coercion which he had been forced to undergo, he

would not have pled as he had.

The Second Circuit did not correlate counsel's unwillingness to prepare himself for Mr. Marquez' defense and his greed for money unearned on the merits of the principle indictment with actual concessions to the Government. Although stating that trial courts must scrutinize with utmost care any effort by the Government to use its control of seized funds in negotiating with defense counsel, the court further explained that:

> [A]ny attempt to use the prospect getting the defendant's lawyer paid from seized funds as a bargaining chip to obtain concessions from the defendant poses the potential for a serious conflict of interest. (Emphasis added).

(Appendix A, page 6).

Concessions by defense counsel were made in this case, in spite of the ruling of the Second Circuit. Nevertheless, by its own admission, "any attempt" to use Petitioner's seized funds as a tool in obtaining concessions from a defendant poses the potential for a serious conflict of interest; such "attempt" at concession should easily qualify as "any fair and just reason" to withdraw Petitioner's presentence plea of guilty. In fact, the second payment of $100,000.00 from Petitioner's seized funds was ordered by the Court three days prior to Marquez' coerced guilty plea. Rehbock knew he would be paid by the Government whether he went to trial or not. However, Rehbock condeded to the Government's demands in order to insure uncomplicated payment. It is of note that this second payment did not occur until after Rehbock had coerced his client into pleading guilty on counts which Petitioner did not commit and would not have plead to had his counsel have been ef-

fective and his plea have been voluntary. Surely this type of prosecutorial and counsel miscon duct, considered with all other reasonable facts of the case, constitutes a concession by Rehbock: he sacrificed the best interests of his client for his own personal interests.

A plea entered under those circumstances is not voluntary since Marquez was denied "close assistance of counsel" prior to entering his plea of guilty. *United States v. Pressley*, 602 F.2d 709, 711 (5th Cir. 1979); See also *United States v. Brown*, 617 F.2d 54, 55 (4th Cir. 1980); see *Kadwell v. United States*, 315 F.2d 667 (9th Cir, 1963). In fact, Petitioner was deprived of due process because his plea was coerced by his own counsel's acting in collusion with the prosecution. See *Milani v. Illinois*, 386 U.S. 12, 87 S.Ct. 874, 17 L.Ed.2d 702, reh'g. denied 386 U.S. 987, 87 S.Ct. 1289, 18 L.Ed.2d 242 (1967).

The Government did use the seized funds as a bargaining chip to obtain certain advantages in conflict with the adversarial system of justice. Even as the potential for a serious conflict of interest existed, so did Petitioner's right to withdraw his plea.

The Government's negotiating with Petitioner's defense counsel in the manner in which it did, as well as Rehbock's responsive acts to the same, ultimately denied Petitioner a voluntary plea free of conflicts of interest between himself and his attorney. Certainly, there can be no doubt that questions exist as to the invalidity of the governmental influence wielded by the prosecution upon Petitioner and his entrusted counsel.

The holding of this Court is clear: A presentence motion to withdraw a plea of guilt should be granted if for any reason it would seem fair and just. Certainly this is in

accord with most circuit court rulings, inclusive of the Second Circuit, as well as the Federal Rules of Criminal Procedure. However, the conflict between the Second Circuit's decision and the rationale in *Kercheval*, *Strickland*, and other decisive rulings could not be more complete. This Court should accept certiorari to correct the lower court's erroneous interpretation of the constitutional mandate of effectiveness of counsel as it relates to the presentence withdrawal of a plea of guilty and the Federal Rules.

b. This Supreme Court Has Left Undecided In Prior Supreme Court Opinions The Issue Of Package Plea Agreements And The Effect That Such Have On The Voluntariness Of Defendant's Plea Of Guilty; As The Second Circuit Essentially Based It's Decision On A Point Left Undecided, Certiorari Should Be Granted To Determine And Clarify The Voluntariness Of Such A Plea And The Right Of The Defendant To Withdraw The Plea Prior To Sentencing.

Package - deal plea bargains have long been the subject of scrutiny and review by various courts throughout this country. It has generally been recognized that the Government may not structure the system so as to coerce a guilty plea. To have a guilty plea withstand constitutional objections, it must have been entered into voluntarily, knowingly and intelligently and waivers of the same must not be lightly inferred. *Bridges v. United States*, 794 F.2d 1189, 1193 (7th Cir. 1986); See also *Brady v. United States*, *supra* and *Reckmeyer v. United States*, *supra*.

In the Second Circuit opinion, the court cited *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978), where this Supreme Court footnoted but found no need to consider "the constitutional implications of a prosecutor's offer

during plea bargaining of adverse or lenient treatment for some person other than the accused". (Emphasis added). (Appendix A, page 7). Since this Honorable Court has not previously ruled on the validity of package plea bargains as they effect the voluntariness of a plea of guilty, this case presents the Supreme Court with the appropriate matter in which to do so. Therefore, certiorari should be granted where, as here, the issue has been left undecided in prior Supreme Court decisions. See *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 297 (1960); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

The prospect of a benefit to a third party poses a greater risk of undue pressure upon a defendant than the chance to secure a reduced sentence for himself. See *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979); *United States v. Tursi*, 576 F.2d 396, 398 (1st Cir. 1978); *United States v. Daniels*, 821 F.2d 76 (1st Cir. 1987).

As explained in the opinion of the Second Circuit:

> A plea negotiated that includes a benefit to a third person can place pressure on a defendant in two respects. The defendant feels the weight of his own concern to have the benefit conferred and also endures the entreaty of the third person who is anxious to receive the benefits.

(Appendix A, page 9).

The Court of Appeals went further to outline three situations in which such pressures can arise, the third of these contexts being: "the prosecution can inform the third party that the benefit will be conferred if the defendant pleads." Id. Finally, the Second Circuit pointed out that it was this third context which seemed to pose the greatest likelihood of pressure, as the "third party's urging will

weigh with the defendant in addition to the defendant's desire to help the third party." Id.

In *United States v. Daniels*, *supra*, the court found that a "fair and just" reason existed to permit the defendant to withdraw his plea of guilt based upon the Government's failure to advise the trial judge at the Rule 11 hearing that it had made clear to defendant that it would not accept guilty pleas from his two familial co-defendants unless he too pled guilty. Such ruling was grounded on the possibility that the familial co-defendants had prevailed upon defendant to plead guilty in order that the Government would accept their own pleas. This consideration, in view of the lack of prejudice to the Government's ability to present its case against defendant at trial by permitting the withdrawal of the pleas, was sufficient to support such withdrawal.

Thus, *Daniels* calls into question the closeness of the voluntariness of a plea which was a direct result of the Government's offer of leniency to third parties in exchange for a defendant's plea. The consequential importance of this issue remains undecided by this Honorable Court.

In the immediate instance, the Second Circuit failed to take into account that Petitioner refused to plea bargain until the last minute, essentially forced to plead his "guilt" in a hurried and tremendously stressful twenty minute time span. Mr. Marquez' reluctance suggests that his wife and co-defendant, as well as his attorney, may have prevailed upon him to plead guilty in order that the Government would accept Mrs. Marquez' own plea. Petitioner contends that, had that coercion and duress not been inflicted upon him, he would not have plead guilty to any of the named counts, particularly to the pled charges to which he now specifically maintains his innocence. Cer-

tainly, it was of no benefit to Mr. Marquez to plead guilty to counts to which he is innocent; the coercion exerted upon him acted solely to his detriment.

At least arguably, the trial judge should have "undertake[n] a more searching inquiry" and attempted to "resolve the contradiction between Petitioner's statements" where Petitioner's substantial rights were in question. *United States v. Daniels*, 821 F.2d 76 (1st Cir. 1987) citing *Mack v. United States*, 635 F.2d 20, 20-25 (1st Cir. 1980); questioned 898 F.2d 214 (1st Cir. 1990). In *Mack*, the Court of Appeals held that the trial judge's failure to insure that a guilty plea is "truly voluntary" and to resolve "all doubt and questions arising about the guilty plea" is grounds to allow withdrawal. (Emphasis added). Therefore, full inquiry was required into Petitioner's substantial right of voluntariness at the time the plea was entered, as such would have reflected, in part, the facts of this case: the apparent closeness of the question of voluntariness where leniency is accorded a third party in exchange for a defendant's plea. The record establishes that, had the trial judge not summarily dismissed Petitioner's statements, as well as the confessions of Rehbock, "any fair and just reason" to permit the withdraw [i.e. the involuntariness of the plea] would have become apparent to the trial court and the requested withdrawal would have been granted.

As a prosecutor's offer of leniency might pose a greater danger of inducing a false guilty plea, (See *Bordenkircher* at 364, no.8), such must surely constitute a substantial cause to withdraw Petitioner's presentence request for withdrawal of a plea of guilt pursuant to F.R.Cr.P. 32 (d) and supporting decisions of this Court. This is especially true when taken into consideration with all other circumstances involved in this case.

Further, unlike many other Rule 32 (d) applications, there would have been no prejudice to the Government had this application been granted. Compare, *United States v. Burnett*, 671 F.2d 709, 712 (2nd Cir. 1982) (five years passed from plea to motion); *United State v. Bryant*, 640 F.2d 170, 172 (8th Cir. 1981) (defendant was to be tried in second of three severed trials but waited until all three trials concluded before moving to withdraw plea); *United States v. Lombardozzi*, 436 F.2d 878, 881 (2nd Cir.), cert denied, 402 U.S. 908 (1971) (plea of guilty entered after major persecution witness testified at trial). The plea here was on the eve of trial and there may be no doubt that the Government was ready to proceed.

The plea of guilt to serious criminal charge should be freely and voluntarily made and entered into by the accused without a semblance of coercion and without fear or duress of any kind. Additionally, the accused should be permitted to withdraw a plea entered unadvisedly when application therefor is duly made in good faith and so sustained by the establishment of "any fair and just reason" for withdrawal.

As the issue of package plea agreements and the effect that such have on the voluntariness of defendant's plea of guilty has been left undecided by this Court in prior Supreme Court opinions, Certiorari should be granted to resolve the continuing controversy and confusion which surrounds this important subject and specifically, this cause.

As shown by the above decisions, the resolution of this troublesome issue has resulted in a state of confusion and conflict among the lower courts. With the scope of a defendant's constitutional guarantees and statutory rights in question, the numerous decisions in the courts below

indicate that this issue is a recurring one. Consideration of the issue by this court is essential.

CONCLUSION

For all the above reasons, this Petition For Writ Of Certiorari should be granted.

Respectfully Submitted,

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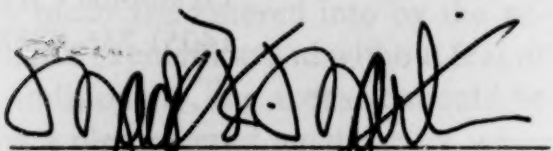
CERTIFICATE OF MAILING

I hereby certify that three (3) true correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit were served on the required parties by placing same in the United States Mail with postage fully pre-paid, this 23 day of November, 1990 to:

Mr. Kenneth W. Starr
Solictor General
Department of Justice
Washington, D.C. 20530
COUNSEL FOR RESPONDENT



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Appendix A; OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA)
Plaintiff Appellee,)
)
v.)
)
LIONEL MARQUEZ)
Defendant-Appellant.)

No. 1150 — August Term 1989
Argued: April 25, 1990
Decided: July 26, 1990
Docket No. 89-1609

Before: VAN GRAAFEILAND, NEWMAN, and KEARSE, Circuit Judges

Appeal from the November 17, 1989, judgment of the District Court for the Southern District of New York (Gerard L. Goettel, Judge) convicting defendant upon his plea of guilty to charges involving drug trafficking and tax evasion.

Affirmed.

Lawrence A. Vogelman, New York, N.Y.

(Barry C. Scheck, Ellen Yaroshefsky, New York, N.Y., on the brief), for defendant-appellant.

Anne T. Vitale, Asst. U.S. Atty., New York, N.Y. (Otto G. Obermaier, U.S. Atty., Joan McPhee, Asst. U.S. Atty., New York, N.Y., on the brief), for appellee.

JON O. NEWMAN, Circuit Judge:

This appeal presents the issue of whether a guilty plea is lawful where the Government informs the defendant that it will agree to a plea bargain in his wife's case only if he pleads guilty. The appeal also implicates the issue of whether the Government may obtain concessions from defense counsel by offering to release seized funds for payment of attorney's fees. These issues arise on an appeal by Lionel Marquez from the November 17, 1989, judgment of the District Court for the Southern District of New York (Gerald L. Goettel, Judge) convicting him upon his plea of guilty to charges involving drug trafficking and tax evasion. We conclude that the guilty plea was validly entered, that leave to withdraw the plea was validly denied, and that the judgement should be affirmed.

Facts

On December 14, 1987, Government agents arrested Marquez and his wife for conspiracy to distribute narcotics and seized various items from their home, including $876,915 in cash. After indicting the couple and others on various charges, the Government obtained a restraining order against the cash, pursuant to the criminal forfeiture provisions of 21 U.S.C. § 853 (e) (1) (1988). Thereafter, this Court ruled that funds legitimately needed for living expenses, including attorney's fees, were not subject to restraint or forfeiture under section 853. See *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (in banc), rev'd, 109 S. Ct. 2657 (1989).

In the interim between this Court's decision in *Monsanto* and the Supreme Court's reversal of that decision, the Government initiated civil forfeiture proceedings against the cash seized from Marquez, pursuant to 21 U.S.C. § 881 (1988). Judge Goettel ruled that our decision

in *Monsanto* controlled and ordered the Government to release $100,000 of the seized funds to pay the retainer of Marquez's lawyer and to release addition funds for legal fees, if needed. On the Government's appeal, we affirmed. *United States v. $876,915.00 United States Currency*, 874 F.2d 104 (2d Cir. 1989). We also directed Judge Goettel to take all necessary steps, within reason, to bring the criminal case to trial at the earliest possible date. Id. at 107.

A pretrial conference was held in the criminal case on May 12, 1989. The Government informed Judge Goettel that the $100,000 check had not yet been turned over to Marquez's lawyer, Richard Rehbock. The prosecutor also announced that it would turn over the check only if Rehbock agreed to a firm trial date no later than June 12, 1989. The prosecutor added that, if agreement to such a date was not reached, it would ask the Supreme Court to stay the order requiring the turnover of $100,000, anticipating that the Court would reverse *Monsanto*, which had already been argued. Rehbock strenuously objected, calling the Government's position "extortion" and contending that the Government "is putting me once again in the position of conflict of interest. I sacrifice my client's rights in exchange for mine." He told Judge Goettel that he needed 60 days to prepare for trial and would be ready immediately after July 4.

Judge Goettel stated that he wanted to bring the case to trial quickly in view of the incarceration of Marquez and his wife and that "forgetting [the prosecutor's] position completely," he had "more or less fixed" on a trial date of June 12 before the Government announced its position. After being informed that counsel for Mrs. Marquez had a scheduling conflict, Judge Goettel set a trial date of June 19. That date was subsequently postponed to July 5.

On June 30, Marquez and his wife pled guilty pursuant to plea agreements. At that time Marquez was named in 23 counts of a superseding indictment, and his wife was named in 19 counts.[1] The indictment alleged various narcotics, gambling, racketeering, money laundering, and tax offenses, including a violation of 21 U.S.C. § 848 (a) (1988) (continuing criminal enterprise). Marquez pled guilty to six counts, including the section 848 (a) violation, and his wife pled guilty to three counts. The plea agreements included a stipulation that his sentence would be within the range of 240 to 293 months and his wife's sentence would be within the range of 121 to 151 months, significantly below the guideline range of 360 months to life, which the Government represented would apply to the facts of their most serious offenses. See *U.S.S.G.* § 6B1.2 (c) (2).

On September 5, Marquez moved pro se to withdraw his guilty plea, pursuant to Federal Rule of Criminal Procedure 32 (d). He alleged inadequate legal representation in that his lawyer was unprepared and had been interested only in obtaining a fee from the seized funds. He also alleged that the circumstances concerning his wife put undue pressure on him to plead guilty and that he had had insufficient time to become aware of the plea agreement and to discuss it with his lawyer. A hearing was held on October 13, at which time his current counsel entered their appearances in substitution of Attorney Rehbock and filed supplemental motion papers. At the hearing, Rehbock testified that the $100,000 had been released to him on June 6 and that he had spent most of his time in June

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[1] The indictment is identified as "SSSSSSSSS 87 Cr. 974". The profusion of S's, we are told, indicates that it is the ninth superseding indictment. Perhaps consideration might be given to designating such an indictment as "87 Cr. 974 (S9)" or "87 Cr. 974-S9".

preparing for trial. He also testified to extensive conversations that he had had with Marquez both before and after discussing the general outlines of the plea agreement with senior officials of the United States Attorney's office. Finally he expressed his opinion that Marquez had pled voluntarily and that all of his answers to the Rule 11 allocution had been truthful. At the conclusion of the hearing, Judge Goettel denied the motion, finding that the plea was voluntary and that Marquez had been well represented by counsel. The District Judge acknowledged that part of Marquez's motivation to enter his plea may have been a desire to assist his wife, but concluded that this circumstance did not render the plea involuntary.

A few days later, Marquez was sentenced to an aggregate prison term of 23 years and fined $100,000. A judgement of forfeiture was also entered as to all of the seized assets.

Discussion

On a Rule 32 (d) motion to withdraw a guilty plea, a defendant has the burden of persuading the trial court that valid grounds for withdrawal exist, *United States v Figueroa*, 747 F. 2d 466, 475 (2d Cir.), cert. denied, 474 U.S. 840 (1985), and the court's decision that the burden has not been met will be reversed only if clearly erroneous, *United States v. Michaelson*, 552 F. 2d 472, 475 (2d Cir. 1977).

1. Marquez contends, first that his plea should have been withdrawn because he was denied the effective assistance of counsel, a claim he premises on the assertion that his former lawyer had a conflict of interest because of concern for obtaining a fee from the seized money. In this case, the release of the $100,000 to pay Rehbock's fee was ordered by this Court under the then applicable authority

of our *Monsanto* decision. Rehbock had no conflict of interest in seeking and obtaining the benefit of that decision. However, the Government came perilously close to creating a conflict of interest situation by attempting to extract a concession from Rehbock concerning a trial date as a condition of its compliance with the order to turn over the funds. Fortunately, Judge Goettel wisely brushed aside the Government's position and set a trial date entirely independently of that position. The initial trial date, June 19, was set without regard to the $100,000 payment, which the Government was ordered to make without any concession on the part of Rehbock. Moreover, the initial trial date was later postponed to July 5, thereby giving Rehbock precisely the amount of trial preparation time that he had requested.

Although the Government's demand at the hearing was without consequence, the prosecution nonetheless seeks to justify its linkage of release of $100,000 of forfeited funds with starting the trial in 30 days by pointing out the reasons for beginning the trial promptly. Thus, the Government notes that this Court had expressed concern about a prompt trial in order to safeguard the speedy trial rights of Marquez's wife and because of the incarceration of Marquez and his wife. The prosecutor's solicitude for a speedy trial misses the point. Though the Government has interest in compliance with speedy trial requirements, any attempt to use the prospect of getting the defendant's lawyer paid from seized funds as a bargaining chip to obtain a concession from the defendant poses the potential for a serious conflict of interest. Now that the Supreme Court has upheld the lawfulness of a pretrial seizure of forfeitable money, without an exception for reasonable expenses such as legal fees, trial courts must scrutinize with utmost care any effort by the Government to use its control of seized funds in negotiating with defense counsel. We

need not rule in this case whether any such negotiation would affect the validity of concessions made by defense counsel, since no concession was made in this case. However, we caution that if such negotiations are valid, the informed consent of the defendant should be obtained on the record.

Marquez's claim that Rehbock devoted inadequate attention to representing him is belied by the record. As a result of Rehbock's efforts, the maximum sentence Marquez faced was reduced from life to 293 months, and the minimum was reduced from 360 to 240 months. The sentence ultimately imposed was seven years less than the minimum term Marquez faced before the plea agreement was negotiated. Moreover, Judge Goettel was entitled to credit Rehbock's testimony concerning the time devoted to trial preparation.

2. Marquez next contends that his plea was involuntary because of the pressure on him arising from the Government's insistence that a plea bargain would not be offered to his wife unless he pled guilty. In *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978), the Supreme Court noted but found no need to consider "the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused." This circuit appears not to have ruled on the matter, though all of the other circuits that have considered the issue have concluded that a plea is not invalid if entered (a) under a plea agreement that includes leniency for a third party or (b) in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered: First Circuit, *Kent v. United States*, 272 F.2d 795, 798 (1st Cir. 1959) (threat to prosecute defendant's fiance); Fourth Circuit, *Harman v. Mohn*, 683 F.2d 834, 836-38 (4th Cir. 1982) (dismissal of charges against de-

fendant's wife); Fifth Circuit, *United States v. Diaz*, 733 F.2d 371, 375 (5th Cir. 1984) (threat to prosecute defendant's sister and brother-in-law); Sixth Circuit, *United State v. Usher*, 703 F2d 956, 958 (6th Cir. 1983) (reduced sentence for defendant's wife); Seventh Circuit, *Politte v. United States*, 852 F.2d 924, 929-31 (7th Cir. 1988) (same); Ninth Circuit, *Cortez v. United States*, 337 F.2d 699 (9th Cir. 1964) (reduced charges against defendant's wife), cert. denied, 381 U.S. 953 (1965); Tenth Circuit, *Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir.) (charges dismissed against defendant's wife and mother-in-law), cert. denied, 479 U.S. 988 (1986); Eleventh Circuit, *Martin v. Kemp*, 760 F.2d 1244, 1248 (11th Cir. 1985) (threat to prosecute defendant's wife); see also ALI Model Code of Pre-Arraignment Procedure § 350.3 commentary at 616-17 (1975) (noting unanimous rejection by ALI Council of recommendation to forbid plea bargains containing third-party benefits); cf. *United States v. Castello*, 724 F.2d 813 (9th Cir.) (prosecutor conditions plea agreement on guilty pleas from all defendants), cert. denied, 467 U.S. 1254 (1984). Where the pleas is entered after the prosecutor threatens prosecution of a third party, courts have afforded the defendant an opportunity to show that probable cause for the prosecution was lacking when the threat was made. *Martin v. Kemp*, 760 F.2d at 1248; *United States v. Nuckols*, 606 F.2d 566, 569-70 (5th Cir. 1979).

We agree with this unanimity of view. The question in every case resolved by a guilty plea is whether the plea is voluntary. "Voluntary" for purposes of entering a lawful plea to a criminal charge has never meant the absence of benefits influencing the defendant to plead. Since a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison, it is difficult to see why the law should not permit the defendant to negotiate a plea that confers a similar benefit on others. Some courts

have expressed a greater risk of undue pressure upon a defendant than the chance to secure a reduced sentence for himself, see *United State v. Nuckols*, 606 F.2d at 569; *United States v. Tursi*, 576 F.2d 396, 398 (1st Cir. 1978), though this view has been doubted, see *Allyn v. Commissioner of Correctional Services*, 708 F. Supp. 592, 594 n.3 (S.D.N.Y. 1989).

A plea negotiation that includes a benefit to a third person can place pressure on a defendant in two respects. The defendant feels the weight of his own concern to have the benefit conferred and also endures the entreaty of the third person who is anxious to receive the benefit. Such pressures can arise in at least three contexts: (a) the defendant can offer to plead if the benefit is conferred, [2] (b) the prosecutor can inform the defendant that the benefit will be conferred if the defendant pleads, and (c) the prosecutor can inform the third party that the benefit will be conferred if the defendant pleads. The first context might seem least likely to create undue pressure for the defendant, since the third-party arrangement originates with him. The third context might seem likely to pose the greatest likelihood of pressure, since the third party's urging will weigh with the defendant in addition to the defendant's desire to help the third party. In most cases, however, the extent of the pressure arising from the prospect of conferring a benefit on a third party will probably be most significantly affected, not by the way the offer arose, but by the extent of the benefit to be conferred and the relationship of the defendant to the third party.

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[2] Of the reported federal appellate decisions concerning plea agreements benefitting third parties, the proposal for the benefit originated with the defendant only in *United States v. Usher*, 703 F.2d at 958.

The inclusion of a third-party benefit in a plea bargain is simply one factor for a district court to weigh in making the overall determination whether the plea is voluntarily entered. See *United States v. Daniels*, 821 F.2d 76, 80 (1st Cir. 1987). In this case, Judge Goettel conducted a thorough Rule 11 allocution. Moreover, the facts concerning the involvement of defendant's wife in the criminal activity and the extent of her benefit were fully aired before the District Court when she and her husband entered their pleas at the same hearing. Both were ably represented by separate counsel. The record supports the finding that Marquez's plea was voluntary, and there is no basis for disturbing the District Court's decision denying the motion to withdraw the plea.

The judgement of the District Court is affirmed.